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No. 94-1530

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 10, 1995
CERTIORARI GRANTED MAY 1, 1995

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- From Petrarca v. Child World, Inc. et al., Case No. CV-1992-03-1069 (Summit County, Ohio, Court of Common Pleas):

DATE	*DESCRIPTION*
March 18, 1992	Summons and Complaint
April 20, 1992	First Leave to Plead (Things Remembered, Inc., successor by merger to Cole National Corporation)
May 11, 1992	Second Leave to Plead (Stipulated)
May 22, 1992	Order (transferring case to inactive docket as to Child World, Inc. only)
May 29, 1992	Answer
June 26, 1992	Amended Answer and Counterclaims
Aug. 28, 1992	First Amended Complaint
Sept. 25, 1992	Notice of Removed Action (to District Court)
Sept. 28, 1992	Notice of Removed Action (to Bankruptcy Court)

- from Petrarca v. Child World, Inc., Case No. 1:92 CV 1996 (N.D. Ohio (Aldrich, J.)):

Sept. 25, 1992	Notice of Removal
Oct. 23, 1992	Petrarca's Motion to Remand to State Court and Motion for Costs and Expenses
Nov. 6, 1992	Things Remembered's Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue with Memorandum in Support
Nov. 17, 1992	Petrarca's Memorandum in Opposition to Defendant's Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue with Memorandum in Support
Nov. 19, 1992	Things Remembered's Memorandum in Opposition to Plaintiff's Motion to Remand to State Court and Motion for Costs and Expenses
Nov. 30, 1992	Things Remembered's Reply Brief in Support of Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue

March 25, 1993	Order (transferring Case No. 1:92 CV 1996 to United States Bankruptcy Court and ordering consolidation with Case No. 92-5207)

- from Petrarca v. Child World, Inc., Case No. 92-5207 (Bankr., N.D. Ohio (White,.J.)):

Sept. 25, 1992	Notice of Removal
Nov. 25, 1992	Petrarca's Motion to Remand to State Court and Motion for Costs and Expenses
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Dec. 17, 1992	Things Remembered's Motion to Transfer Venue with Memorandum in Support
Dec. 28, 1992	Plaintiff's Brief in Opposition to Motion to Transfer Venue

Jan. 26, 1993	Things Remembered's Reply Memorandum in Further Support of Motion to Transfer Venue
March 29, 1993	Petrarca's Supplemental Authority in Support of Plaintiff's Motion to Remand
June 25, 1993	Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, with Order Granting Motion to Transfer Venue and Denying Motion for Costs and Fees

- from Petrarca v. Things Remembered, Inc., Case No. 5:93-CV-1582 (N.D. Ohio (Bell, J.)):

Aug. 13, 1993	Brief for Appellant Petrarca
Aug. 31, 1993	Brief for Appellee Things Remembered, Inc. (specifically, Exhibit B thereto: "Order Approving Settlement Agreement Among Child World, Inc. and Cole National Corporation, CW Holding Corporation and Things Remembered, Inc.," entered May 4, 1993 in In re Child World, Inc., Chapter 11 Case No. 92 B 20887 (HS), Child World, Inc. v. Cole National Corporation, et al., Adv. Proc. Proc. No. 93-5025A (Bankr., S.D.N.Y.))

Sept. 27, 1993	Plaintiff-Appellant Petrarca's Reply Brief
Aug. 11, 1994	Order (reversing the Bankruptcy Court's Order of June 25, 1993 and remanding the case to the Bankruptcy Court)

- from Petrarca v. Things Remembered, Inc., Case No. 94-3980 (6th Cir.):

Sept. 29, 1994	Order (to show cause why appeal should not be dismissed for lack of jurisdiction)
Nov. 15, 1994	Order (dismissing case *sua sponte* for lack of jurisdiction)
Jan. 12, 1995	Order (denying petition for rehearing en banc)

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	ADVERSARY
	)	PROCEEDING 92-5207
ANTHONY PETRARCA	)	
	)	
	)	RELATED CASE
Plaintiff	)	CHILD WORLD, INC.
	)	CHAPTER 11 PENDING
vs.	)	IN THE BANKRUPTCY
	)	COURT FOR THE
CHILD WORLD, INC.,	)	SOUTHERN DISTRICT
et al.	)	OF NEW YORK CASE
	)	NO. 92 B20 887 (HS)
Defendant	)	

MEMORANDUM OF DECISION ON MOTION TO REMAND AND MOTION TO TRANSFER VENUE

Before this court is a motion filed by plaintiff Anthony A. Petrarca ("Petrarca") to remand this action to state court. Also before this court is a motion by defendant Things Remembered, Inc. ("TR") for transfer of venue to the U.S. Bankruptcy Court, Southern District, New York. A pre-trial conference was held on these motions and no hearings were requested by the parties and the court finds counsel has waived any request for a hearing. Upon review of the record and pleadings, this court concludes that the removal was proper and the motion for transfer of venue shall be granted. This court shall defer all other issues to the Bankruptcy Court, Southern District, New York.

Before discussing the applicable law, a brief review of the background of this proceeding is necessary.

TR and Child World, Inc. ("Child World") jointly filed a notice of removal in this court and the U.S. District Court, Northern District of Ohio, on September 25, 1992, on an action pending against them in the court of Common Pleas, Summit County, Ohio, being titled Petrarca v. Child World, Inc., et al., Case No. CV-92-03-1069 (the "State Action").

Prior to the removal, on March 18, 1992, Petrarca commenced the State Action against Child World and Cole National Corporation ("Cole"). TR is a successor, by merger, to Cole. The basis of the State Action relates to Child World's alleged breach for failure to pay rent under two commercial lease agreements. The parties to the leases are Petrarca and Child World. The State Action also seeks payment from Cole based upon an alleged guaranty of the performance of Child World under the leases. Child World filed for protection under chapter 11 of the U.S. Bankruptcy Code on May 6, 1992 in the U.S. Bankruptcy Court, Southern District, New York.

On August 28, 1992 Petrarca filed its first amended complaint (the "amended complaint") in the State Action. (See, Exhibit D to Motion to Remand.) The amended complaint indicates that Child World had filed for chapter 11 protection and also alleges additional lease claims against Child World and TR.

The leases in the State Action have been rejected in the Child World Bankruptcy case pursuant to applicable bankruptcy law.

In the State Action, TR also filed a motion to dismiss Petrarca's amended complaint or stay proceedings related thereto until the Bankruptcy Court, Southern District, New York, has determined the extent of Child World's obligations, as tenant, under the leases.

Also pending, from the District Court file records, is a motion filed by National Fire Insurance Company of Hartford to intervene in this proceeding.

On March 8, 1993, TR and Colfax Manor Gardens, a counterclaim defendant, filed a stipulated notice of dismissal which dismissed a third party complaint filed against Colfax Gardens.

On March 26, 1993, the removal action pending in District Court was transferred and consolidated with the removal filed in this court. Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court.

This court has reviewed the decision of Judge Speer in In re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987) and finds the facts similar to this case and also finds his reasoning persuasive. In Aztec a state action was removed to the bankruptcy court, and a motion to transfer the removed case to the bankruptcy court in Oklahoma was filed. Judge Speer determined that he was required to review the jurisdictional issues only. The action was found to be properly removed and the motion to transfer was granted. Judge Speer noted that the "home" bankruptcy court in Oklahoma was more familiar with the pending bankruptcy case and what would be required for efficient

administration. Judge Speer followed the rationale of a similar case and stated:

> the proper role of the "conduit" court was to transfer the action to the "home" Bankruptcy Court to decide the issue of whether to remand or abstain from hearing the action.

Id. at 467 citing In re Convent Guardian Corp., 75 B.R. 346, 347 (Bankr. E.D. Pa. 1987).

This court agrees with Judge Speer and, accordingly, will only address the issue of removal to determine if this court has proper jurisdiction of this matter.

Petrarca contends the State Action should be remanded because this case was wrongfully removed to this court. Petrarca also requests this court order TR to pay its costs and fees as a result of the alleged wrongful removal.

Petrarca contends the removal was improper because: (1) it was not timely filed; and (2) TR has waived its right to removal because it filed permissive offensive counterclaims and crossclaims.

Although TR indicates it "attempted to be as concise as possible" it has submitted an exhaustive 38 page memorandum in opposition to the motion to remand. In its effort to be concise, TR has included string cites for fundamental propositions of law, many of these string cites exceed one page. See, eg. pp. 9-10; pp. 15-16. TR also states Petrarca's 27 page memorandum in support exceeds the 15 page limit of Local Rule 8:8.1(f). TR was granted leave to file its 38 page memorandum. This court takes note that Petrarca's memorandum exceeds the 15 page limit

without court approval. However, after reviewing both memoranda, this court's only comment is that if the 15 page limit was observed by both sides, all parties to this action would have been better served by their counsel.

The Removal to District Court

TR contends it timely removed the State Action to District Court because it did not become removable until after the amended complaint was filed on August 28, 1992.

28 U.S.C. §1446(b) states, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

TR contends it received the amended complaint on August 31, 1992, which contained ten additional counts on additional lease guaranties which required the application of federal bankruptcy law. Thus, TR states, its removal filed on September 25, 1992 was within the 30 day period under §1446(b).

This court agrees with TR. The court has reviewed the original complaint and the amended complaint (Notice

of Removal, Exhibits 1 and 27) and finds that the parties are the same and the only change in the amended complaint is the addition of ten claims based on other leases and guaranties between the parties. The new claims against TR address additional leases and also indicate that Child World is operating under federal bankruptcy law protection. The claims are state law claims but, because they involve lease rejection and guaranty claims, they are specifically and exclusively addressed in the bankruptcy code. Thus, it is the opinion of this court that the action became removable to District Court upon the service of the amended complaint which indicated Child World had filed a petition in bankruptcy. Thus, the notice of removal filed on September 25, 1992 in the District Court was timely under §1446(b). Striff v. Mason, 849 F.2d 240, 244 (6th Cir. 1988) (an action may be removed "where the real nature of the claim asserted in the complaint is federal, irrespective of whether it is so characterized"); E.W. Bowman, Inc. v Norfolk and Western Railway Co., 403 F. Supp. 389, 390 (W.D. Pa. 1975) "([federal] question must appear in plaintiff's complaint by direct and positive allegations or by necessary implication from the matters alleged").

The Removal to Bankruptcy Court

Federal Rule of Bankruptcy Procedure ("Rule") 9027 addresses removal actions and provides, in relevant part:

> (2) TIME FOR FILING; CIVIL ACTION INITIATED BEFORE COMMENCEMENT OF THE CASE UNDER THE CODE. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days

> after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

Rule 9027(a)(2).

Petrarca contends the removal to this court was outside the 90 day time period and, therefore, must be remanded. This court agrees that the removal to this court was untimely. In reviewing Rule 9027, it appears that the 90 day time limit is the only provision applicable to this case. There is no indication before this court that an applicable order for relief from stay was entered or that a chapter 11 trustee has been appointed in the Child World case. The State Action was initiated before the bankruptcy filing of Child World on May 6, 1992, thus, the removal had to be filed no later than 90 days thereafter, which is August 5, 1992. However, the notice of removal was filed on September 25, 1992 in this court, clearly beyond the time limit. Thus, this court finds the bankruptcy removal is untimely.

However, because the removal was timely filed in the District Court, as stated earlier, and subsequently consolidated with the pleadings filed herein, this court finds that TR has filed a timely removal.

Petrarca also argues that TR has waived its right to remove this action by filing permissive offensive counterclaims and crossclaims in the state court. TR

responds that it could not have waived its right to removal when it filed the counterclaims and crossclaims on June 26, 1992, because it had no right to remove until the amended complaint was later filed and served August 31, 1992.

This court agrees with TR's position. Petrarca argues that a waiver of a right to removal occurs when a defendant files a permissive pleading seeking affirmative relief and cites in support, inter alia, Bedell vs. H.R.C. Ltd., 522 F. Supp. 732 (E.D. KY. 1981).

In Bedell the court explained that a defendant may waive its right to remove an action by taking certain acts in state court that are deemed to constitute a submission to its jurisdiction. 522 F. Supp. at 737. Such acts may include the filing of a permissive crossclaim. Id. Other acts that could result in a waiver of the right to remove are the filing of pleadings seeking affirmative relief resulting in an adjudication on the merits of an issue which could result in the dismissal of the action in whole or in part. Id. at 738.

This court does not disagree with the holding in Bedell but does find another case cited more instructive. The court in Bolivar Sand Company, Inc. v. Allied Equipment, Inc., 631 F. Supp. 171, 172 (W.D. Tenn. 1986) explains that a right to remove can only be waived by actions of the defendant after the case clearly becomes removable. See also Johnson v. Celotex Corp., 701 F. Supp. 553, 554 (D.Md. 1988).

Accordingly, in the context of this case, because TR's right to remove the state court action on federal question grounds did not arise until August 31, 1992 (the date on which it first received a copy of Petrarca's amended complaint), very simply, whatever TR or Child World did

prior to that date could not possibly have constituted a waiver of the right to remove this action.

This court finds that TR did not waive its right to remove this action and removal was proper. Therefore, this court finds it has jurisdiction to consider the motion to transfer venue. Furthermore, as this court finds that removal was proper Petrarca's motion for costs and fees incurred as a result of removal shall be denied.

Motion to Transfer Venue

TR requests this court transfer this proceeding to the Bankruptcy Court in the Southern District of New York, where the Child World case is currently pending. TR relies on Aztec, supra, and Dunkirk Limited Partnership v. TJX Companies, Inc., 139 B.R. 643 (N.D. Ohio 1992).

This court agrees with the holding in Aztec that this action should be transferred to the "home" bankruptcy court in New York. As discussed earlier, this court finds this action was properly removed and thus, jurisdiction is proper to consider the motion to transfer venue.

Accordingly, this court adopts the sound reasoning of Judge Speer in Aztec at page 467:

> In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. This [conduit] Court's speculation on these matters would not be an adequate substitute

> for a knowledgeable determination based upon the actual facts and circumstances. Moreover, allowing the Oklahoma Court to rule on the remand issues minimizes the potential conflicts which could arise due to differences in controlling authority between the Courts. Accordingly, a final ruling on the venue issues, and the many sub-issues which have been raised within the context of venue, remand, and abstention, should be left to the "home" Bankruptcy Court in Oklahoma.

This court also finds Dunkirk persuasive authority wherein Judge Battisti enforced a stay of a removed state action based upon a lease dispute. The Dunkirk court held that allowing the action to go forward in state court "would be contrary to federal policies designed to reach just and efficient results by bringing together as much as possible litigation affecting a bankrupt estate". Id. at 647.

Therefore, based upon the foregoing, this court shall enter a separate order denying Petrarca's motion for costs and fees and granting the motion of Things Remembered to transfer venue to the Bankruptcy Court for the Southern District of New York.

June 25, 1993

/s/ H. F. White
H. F. WHITE
Bankruptcy Judge

[Certificate of Mailing Omitted in Printing]

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	ADVERSARY
	)	PROCEEDING 92-5207
ANTHONY PETRARCA,	)	
	)	
Plaintiff,	)	RELATED CASE
	)	CHILD WORLD, INC.
vs.	)	CHAPTER 11 PENDING
	)	IN THE BANKRUPTCY
CHILD WORLD, INC.,	)	COURT FOR THE
et al.	)	SOUTHERN DISTRICT
	)	OF NEW YORK CASE
Defendant	)	NO. 92 B20 887(HS)

ORDER GRANTING MOTION TO TRANSFER VENUE AND DENYING MOTION FOR COSTS AND FEES

Based upon the "Memorandum of Decision on Motion to Remand and Motion to Transfer Venue" entered by this court on the 25 day of June, 1993;

It is the order of this court that the motion for costs and expenses related the removal of this action filed by Anthony A. Petrarca is DENIED;

It is the further order of this court that the motion filed by Things Remembered, Inc., to transfer venue of this action to the U.S. Bankruptcy Court, Southern District of New York, wherein is pending the related case Child World, Inc., case no. 92 B20 887(HS) is GRANTED.

So ordered this 25 day of June, 1993.

/s/ H. F. White
H. F. WHITE
Bankruptcy Judge

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Anthony A. Petrarca,	)	**CASE NO. 5:93-CV-1582**
	)	
Plaintiff/Appellant,	)	**BANKRUPTCY CASE NO.**
	)	92-5207
- vs -	)	
	)	Judge Sam H. Bell
Things Remembered, Inc.,	)	
	)	
Defendant/	)	**ORDER**
Appellee	)	

Presently before the court is Plaintiff-Appellant Anthony Petrarca's appeal from the U.S. Bankruptcy Court for the Northern District of Ohio's order granting Defendant/Appellee's motion to transfer venue (docket #9).

STATEMENT OF FACTS

The plaintiff, Anthony Petrarca, initiated this action in the Court of Common Pleas, Summit County, Ohio on March 18, 1992. His four count complaint asserted claims against Child World as lessee and Cole National as guarantor for delinquent rents, future rents (pursuant to an acceleration clause), unpaid common area maintenance costs, taxes, insurance, and late fees from two leases. On April 14, 1992 Things Remembered, Inc. ("TRI")

voluntarily entered the case as the successor by merger to Cole National and filed for Leave to Plead.

On May 6, 1992, Child World filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of New York. Child World filed a suggestion of stay in the Summit County Common Pleas Court on May 11, 1992, and that court transferred the case (against only Child World) to its inactive docket on May 22. Child World simultaneously rejected the leases.

TRI filed its answer to Petrarca's complaint on May 28, 1992; it filed an amended answer with counterclaims against Petrarca and Colfax Manor Gardens on June 26, claiming that its guarantees were limited and that Petrarca's assignment of the leases to Colfax without Cole National or TRI's consent discharged TRI of its obligations. TRI also claimed in the amended answer that Child World's Chapter 11 bankruptcy filing allowed Child World to reject the leases.

On August 28, 1992, Petrarca filed an amended complaint bringing ten additional claims regarding five other leases against TRI and Cole National. Recognizing Child World's Chapter 11 status and the Summit County stay, Petrarca did not bring any additional claims against Child World.

On September 25, 1992, TRI filed Notices of Removal in the Summit County court, the U.S. Bankruptcy Court for the Northern District of Ohio, and the United

States District Court for the Northern District of Ohio.[1] In support of removal, TRI argued that only the home bankruptcy court in New York could determine the extent of Petrarca's lease rejection damages, if any, after determining Child World's obligations under the leases. This being true, TRI reasoned, TRI's obligations as Child World's guarantor must also be measured by, or with reference to, Child World's obligations as determined under the bankruptcy code. Accordingly, TRI explained, the matter involved a federal question and was properly removed pursuant to 28 U.S.C. §1441. Relying upon the same assumptions, TRI further reasoned that the case was "related to" Child World's bankruptcy proceeding in New York and was therefore removable under 28 U.S.C. §1452.

Plaintiff filed a motion to remand with the district court on October 23, 1992. Judge Aldrich eventually transferred the district court case to the bankruptcy court for

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[1] There remains a fair amount of confusion among courts concerning whether notices of removal taken pursuant to 28 U.S.C. §1452 are properly filed with the bankruptcy court instead of the district court. See In re Aztec Industries, Inc., 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987) (holding that petition may be filed directly with the bankruptcy court and citing supporting, as well as contradictory, authority). TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty. The unfortunate consequence of this dual filing was the engendering of separate proceedings involving one and the same action within a single court system.

Although the two matters were ultimately "consolidated" by the district court, a more appropriate course, it seems, would have called for this court to determine whether it or the bankruptcy court properly retained jurisdiction over the matter. While TRI presumably had two adequate, independent bases for removal, it plainly did not have two separately removable actions.

consolidation with the matter pending before Bankruptcy Judge White.

On May 25, 1993, the Ohio bankruptcy court granted a motion by TRI to transfer venue to the United States Bankruptcy Court for the Southern District of Ohio. In so doing, Judge White determined that the notices of removal were timely filed, that TRI had not waived the right to remove the action, and that the court's sole role as a "conduit" bankruptcy court was to transfer the case to the "home" court in New York.

Petrarca now appeals Judge White's May 25, 1993 order.

LAW AND ANALYSIS

Petrarca raises three issues in its appeal. First and foremost, it challenges as erroneous the determination by the bankruptcy court that TRI timely removed the State action. Second, Petrarca claims that the bankruptcy court erred in finding that TRI did not waive its right to remove the action. Third, TRI [sic-Petrarca] objects to the bankruptcy court's refusal to abstain from hearing the removed action. Because the objections raised concern conclusions of law reached by the bankruptcy court, this Court reviews the matter de novo. In re Edward M. Johnson, 845 F. 2d 1395, 1398 (6th Cir. 1988).

I. Timeliness of Removal.

As mentioned above, TRI purported to remove this matter from state court pursuant to two independent federal statutes. Petrarca moved the bankruptcy court to remand the action for want of jurisdiction, arguing that TRI had failed to remove the matter within the time period provided

by either statute. The bankruptcy court held that TRI failed to remove the matter pursuant to §1452 (bankruptcy removal) of Title 28 in a timely manner. The bankruptcy court further held, however, that TRI's removal was timely under §1441 (federal question removal) of the same title, and, for that reason, the court believed itself to have jurisdiction to consider TRI's motion to transfer.

A. Timeliness of Federal Question Removal

Section 1331 of Title 28 provides the federal district courts original jurisdiction over all civil actions "arising under the Constitution, law, or treaties of the United States." 28 U.S.C. §1331. Section 1441 of the same title allows for the removal to federal district court of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction...." 28 U.S.C. §1441. As discussed above, because TRI believed the application and construction of Title 11 to be determinative of the present dispute, it relied in part upon §1441 in removing the action to the district court.

The chief issue of contention between the parties concerns the timeliness of TRI's notice of removal. At the core of this dispute is the language of 28 U.S.C. Section 1446(b), which sets forth the appropriate time frame for removing matters deemed removable under §1441. Section 1446(b) provides in relevant part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is

> based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1441(b) (emphasis added).

Petrarca's original complaint did not, when filed, implicate the federal bankruptcy code or any other provisions of federal law. Therefore, it was not immediately removable, and the thirty day period in which to remove did not begin to run upon service of the summons as provided in the first paragraph of §1446(b). Rather, the filing period commenced "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper form which it ... [was ascertainable] that the case [was]" removable. The pertinent question for our immediate purpose thus becomes, "What form of notice to the defendant is required to trigger the clock on the thirty-day filing period provided in the second paragraph of §1446(b)?"

Two competing views have polarized courts faced with the same question. Many courts interpret §1446(b) strictly to require that the defendant receive formal notice from a voluntary act of filing taken by the plaintiff. Apache Nitrogen Products, Inc. v. Harbor Insurance Co., 145 F.R.D. 674 (D. Ariz. 1993); Phillips v. Allstate Insurance Co., 702 F. Supp. 1466 (D. Cal. 1989); Jong v. General Motors Corporation, 359 F. Supp. 223 (N.D. Cal. 1973). Under this view, unless the grounds for removal appear on the face of a pleading or other filing by the plaintiff, the defendant is free to rest upon his right to remove, regardless of his actual knowledge of grounds upon which to do so. See, e.g., Jong, 359 F. Supp. at 226 ("Therefore, the time period to remove an action cannot depend on defendant's actual knowledge, because the statute expressly allows a defendant to rely on papers presented to it.").

Consistent with this line of authority, TRI argues that the thirty-day period in which it could remove this action began on August 31, 1992 -- the date on which Petrarca served TRI with a paper (its amended complaint) containing specific reference to Child World's bankruptcy.

Judge White accepted as persuasive TRI's arguments and authority, holding "the action became removable to District Court upon the service of the amended complaint on August 31 which indicated Child World had filed a petition in bankruptcy." Memorandum of Decision filed June 25, 1993, p. 5. Thus, he concluded, TRI's notice of removal filed September 25, 1992 was timely. Id.

Petrarca finds fault with the Bankruptcy Court's narrow reading of §1446(b)'s notice requirement because such a reading ignores TRI's actual knowledge of grounds for removal. Adopting the alternative view, Petrarca insists

that the removal period commenced on May 6, 1992 when Child World filed its petition for relief under Chapter 11 and thereby gave TRI actual, if not formal, notice of such grounds.

Petrarca is not alone in arguing the propriety of construing §1446(b)'s notice requirement liberally. See e.g. Mielke v. Allstate Ins. Co., 472 F. Supp. (E.D. Mich. 1979) (no additional time for removal is allowed if the presence of removal grounds is unambiguous in light of the defendant's knowledge and the claims of the initial complaint); Weaver v. Miller Electric Mfg. Co., Inc., 616 F. Supp. 683 (S.D. Ala. 1985) (the defendant should remove the case if it comes by knowledge, independent of the plaintiff, requiring removal and should not sit upon its rights). In their widely regarded treatise, Wright, Miller and Cooper opine that §1446(b)'s "clear purpose to commence the running of the thirty-day period once the defendant receives actual notice that the case has become removable ...." C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters, §3732, p. 520 (1985) (emphasis added).

This Court need not weigh afresh the competing arguments concerning the form of notice necessary to start §1446(b)'s thirty-day clock; the Sixth Circuit Court of Appeals has already considered and answered the question. In Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at **3 (6th Cir. June 26, 1991), the court held:

> 1446(b) starts the thirty-day period running from the date that a defendant has solid and unambiguous information that the case is removable, even if that information is solely

> within its own possession.....Any ambiguity regarding the scope of 1446(b) must be resolved in favor of remand to the state courts.

Believing §1446(b) to be ambiguous on its face, the court construed the statute so as to prevent a defendant from "sit[ting] upon information in its possession until it feels the time is right to trigger removal ..." after having forced the plaintiff to exhaust his resources in the state court. Id. at **4. In so doing, the court specifically discounted the applicability of the "Voluntary Act" doctrine in matters involving federal question (as opposed to diversity) removal. Id. at **5.

Holden teaches that §1446(b)'s thirty-day filing period commences once the defendant gains "solid and unambiguous information that the case is removable," regardless of the source of that information. Id. at **3. Petrarca contends that TRI received actual notice that the case was removable on May 6, 1992 when Child World filed chapter 11 petitions. TRI claims that it did not have notice until August 31, 1992 when it was served with Petrarca's amended complaint bringing new claims for other leases which involved the application of bankruptcy law.

The facts and pleadings placed before this Court demonstrate that the Petrarca's amended complaint was merely the procedural tool with which TRI procured removal as opposed to the actual source from which TRI discovered the basis for that removal. The amended complaint does not allege facts concerning Child World's bankruptcy petition which were unknown to TRI. Given the corporate relationship between the two defendants, it is nearly impossible to imagine that TRI was unaware on

May 6, 1992 that Child World was filing a bankruptcy petition. Assuming arguendo it was unaware on May 6, it plainly had knowledge of the bankruptcy proceedings on June 26, 1992, the date on which it filed its amended answer. In that answer, TRI pointed to Child World's petition as justification for Child World's rejection of its leases. Thus, TRI plainly had solid, unambiguous information form which it had received actual notice of the bankruptcy by June 26, 1992. This being true, the September 25, 1992 notice of removal was plainly without the thirty-day period for removal provided by §1446(b).

B. Timeliness of the bankruptcy court removal

Having determined that TRI did not timely remove this matter pursuant to 28 U.S.C. §§1441 and 1446, the Court considers whether TRI nonetheless properly removed it under 28 U.S.C. §1452. Section 1452 provides specifically for the removal of claims related to bankruptcy cases. It states in part:

> (a) A party may remove any claim or cause of action in civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334[2] of this title.

28 U.S.C. §1452.

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[2] Section 1334 provides the district courts with original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334.

Bankruptcy Rule 9027 (titled "Notice of Removal") places temporal limitations upon the removal of claims or causes under §1452. In re Aztec Industries, Inc., 84 B.R. 464, 469 (Bankr. N.D. Ohio 1987). Rule 9027(a) provides in part:

> (2) If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay if the claim or cause of action in a civil action has been stayed under Section 362 of the Code, or (C) 30 days after a trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief.
>
> (3) If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

Bankruptcy Rule 9027(a)(2) & (3).

Petrarca initiated the state action on March 18, 1992. The "related" case under the bankruptcy code commenced on May 6 of the same year when Child World filed its Chapter 11 petitions in New York. Since the Ohio state action preceded the related bankruptcy action, the bankruptcy court for this district applied the ninety-day limit provided in sub-section (a)(2) of Rule 9027 to determine the timeliness of TRI's removal under 1452. The ninety-day period ended on August 5, 1992; accordingly, the bankruptcy court concluded that TRI's September 25 removal was not timely under §1452.[3]

Contesting this conclusion, TRI distinguishes claim removal from removal of an entire cause of action, noting that §1452 allows a party to remove individual claims to bankruptcy court without removing the entire lawsuit. Because ten of the removed claims (those added by Petrarca in its August 8, 1992 amended complaint) had not yet been filed when the ninety-day period provided by Rule 9027(a)(2) expired, TRI reasons, it was impossible for TRI to remove those claims within the ninety-day window. Rather, TRI implies, it had -- consistent with Rule 9027(a)(3) -- an additional thirty-days from receipt of the amended complaint in which to remove the new claims set forth therein.

The Bankruptcy Court for the Northern District of Texas, when considering whether an amendment to the plaintiff's pleadings operates to extend the removal period provided by Rule 9027, turned to 28 U.S. C. §1446 for guidance, observing:

---

[3] Because it believed TRI's removal to be timely pursuant to 28 U.S.C. §§1331 & 1346, however, the bankruptcy court declined to remand the action.

> Bankruptcy Rule 9027 substantially conforms to the language and procedure of 28 U.S.C. §1446. There is no case law to guide this Court on the effect of amended pleadings on the removal of cases under 28 U.S.C. §1478 [since repealed and replaced by 28 U.S.C. §1452] and Bankruptcy Rule 9027. This Court must rely on decisions concerning the removal of state court actions to United States district under 28 U.S.C. §1446 for guidance since federal law controls.

In Re Shaffer, 42 B.R. 522, 525 (Bankr. N.D. Tex. 1984). Having conducted an extensive search, this court has found no authority offering a mere [sic] persuasive method of analysis than that employed in Shaffer. That court's reliance on §1446 seems prudent and leads to a logical resolution of the problem before us.

As discussed previously, 28 U.S.C. §1446 allows for removal from state to district court: (1) within thirty days after service of the initial pleading setting forth the removable claim; or (2) "if the case stated by the initial pleading is not removable," within thirty days of receipt by defendant of information demonstrating that the matter has become removable. Thus, "[u]nless the amendment gives rise to another removable basis, a party will not acquire an additional thirty days in which he or she can remove his or her case." Shaffer, 42 B.R. at 525 (emphasis added).

Were it true that Petrarca's amended complaint presented for the first time removable claims, this Court might be persuaded that TRI had thirty more days in which to remove those claims. Under the circumstances presented, however, this court feels the bankruptcy court

properly held that TRI failed to remove its case pursuant to §1452 in a timely fashion.

As previously observed, the ten claims added by Petrarca's amended complaint were predicated upon grounds identical to those underlying the two claims comprising the initial complaint. Accordingly, if -- as TRI alleges -- the added claims were removable because they were related to Child World's bankruptcy, so too were the original claims. Thus, the original cause of action was pending and removable within the purview of Rule 9027(a) when Child World filed for Chapter 11 protection on May 6, 1992. TRI's opportunity to remove that cause (or any single claim therein) pursuant to §1452 and Rule 9027(a) rose on May 6 and expired ninety days thereafter. The "new" claims asserted in the amended complaint did not enable TRI to revive its lost removal option since they neither added nor substantially altered the basis for removal.

II. Remaining Issues on Appeal.

Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's order denying Plaintiff's motion to remand and granting Defendant's motion to transfer venue is reversed. The case

is remanded to the Bankruptcy Court for further proceedings consistent with this order.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
United States District Judge

APPENDIX C

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY A. PETRARCA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
THINGS REMEMBERED, INC.,	)	
	)	
Defendant-Appellant	)	

Defendant filed a notice of appeal of the order of the district court remanding this action to the bankruptcy court for the purposes of remanding it to the state court from which it had been removed. The district court concluded that defendant's notices of removal pursuant to both 28 U.S.C. § 1441 and 28 U.S.C. § 1452 were untimely. Consequently, the bankruptcy court lacked jurisdiction.

As a general rule, an order remanding an action to a state court from which is [sic] was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§1447(d) and 1452(b); *see State of Ohio v. Wright,* 992 F. 2d 616 (6th Cir. 1993) (en banc); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F. 2d 1341 (6th Cir. 1993); *Boone Coal*

and Timber Co. v. Polan, 787 F. 2d 1056, 1061 (6th Cir. 1986). It does not appear, therefore, that the order of the district court is an appealable order.

Defendant is hereby direct [sic] to show cause, within twenty-one days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/ Leonard Green

APPENDIX D

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY A. PETRARCA, Plaintiff-Appellee, v. THINGS REMEMBERED, INC., Defendant-Appellant.	)	O R D E R
	)	NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN, District Judge.*

This action, initially filed in the Court of Common Pleas of Summit County, was removed by defendant pursuant to 28 U.S.C. §§ 1441 and 1452. Finding that the notices of removal were not timely filed, the district court remanded the action to state court. Defendant filed a notice of appeal of the remand order. In response to a show cause order issued by the court, defendant argues that the remand

* The Honorable Richard A. Enslen, United States District Judge for the Eastern District of Michigan, sitting by designation.

order is reviewable on appeal. Plaintiff asserts that the court lacks jurisdiction to consider the appeal.

As a general rule, an order remanding an action to a state court from which it was removed "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Defendant argues that this general prohibition against appellate review is not applicable because this action was removed and remanded pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452. The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed, within the time required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. *See Ohio v. Wright*, 992 F.2d 616, 618-19 (6th Cir. 1993); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1343-50 (6th Cir. 1993). In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225-26, (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 590-91, (5th Cir. 1987); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1060, (6th Cir. 1986); *see United States v. Rice*, 327 U.S. 742, 752 (1946).

It therefore is ORDERED that the appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: CHILD WORLD, INC.	)	
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ANTHONY A. PETRARCA,	)	
	)	
Appellee,	)	
	)	
v.	)	ORDER
	)	
THINGS REMEMBERED, INC.,	)	
	)	
Appellant.	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk